FILED
JUN 28 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 218

GEORGE H. HAYES, JR., PETITIONER,
VS.
C. C. MOORE CONSTRUCTION COMPANY, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

May It Please the Court:

The petition of George H. Hayes, Jr., respectfully shows to the court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

First. *History of the Case*: This suit was filed by petitioner, a citizen of Mississippi, as plaintiff below, against the respondent, a citizen of Florida, as defendant below, in the District Court of the United States for the Hattiesburg Division of the Southern District of Mis-

sissippi. Based upon the verdict of a jury, judgment was entered by the district court in petitioner's favor, from which an appeal was prosecuted by respondent as appellant to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the judgment of the district court and entered judgment in favor of respondent, dismissing petitioner's cause, and petitioner now seeks a review of the decision of the circuit court of appeals.

Second. *Statement of the Pleadings:* 1. *The Complaint.* (a) Petitioner's complaint alleged that respondent, pursuant to a contract with the Mississippi State Highway Commission, was engaged in the construction of a new highway extending from Hawkins Avenue in the city of Columbia, Marion County, Mississippi, in a northerly direction to the Marion County line, a distance of approximately ten miles; that respondent was in full possession and control of said highway and the right of way thereof between the points named; that this new highway intersected Hawkins Avenue about 250 yards east of the old highway and followed an entirely new route and new right of way for a distance of approximately six miles north of said city, at which point the old and new highways converged (R. 2) and that they then followed the same right of way for some distance, the old highway being entirely replaced by the new highway, and that persons traveling south, upon either the old or new highway, would be compelled to get upon and travel the new highway for some distance at this point six miles north of Columbia, and that at the point where the old and new highways intersected the respondent, during the course of construction of the new highway, had maintained a barricade so as to divert southbound traffic onto the old highway for the remaining distance of six miles into Columbia; that this barricade had been so maintained for several months prior to the time of the wrongs complained of, but that respondent removed the same shortly before the injuries in question and opened the

new highway to the public for this distance of six miles to the end of the highway at Hawkins Avenue in Columbia, and invited the public to use and travel the same over this six-mile link of the new highway; that the grading of said new highway had been finished, the same had been surfaced with gravel, and was being constantly used by the public with the full knowledge of and at the invitation of respondent, but that said new highway was still in the full possession and control of respondent and it was engaged in dressing up and putting the finishing touches to said highway (R. 3) in accordance with its contract, preparatory to final acceptance of said highway by the State Highway Commission, which completion and acceptance took place after the occurrence of the injuries complained of.

(b) That the new highway ended at said Hawkins Avenue which was the only public street in Columbia intersected by it and persons traveling south on the highway en route to Columbia were compelled to enter Hawkins Avenue; that at this point the new highway ran almost due north and south and Hawkins Avenue ran in an easterly and westerly direction and that at the intersection "there was an exceedingly sharp curve upon an angle of approximately 110 to 120 degrees, and was so sloped that it was exceedingly dangerous for automobiles to undertake to turn said curve at said intersection while traveling at a rapid rate of speed, and the said curve was constructed by the defendant, and was in the exclusive possession and control of the defendant at the time of the wrongs and injuries herein complained of, and the defendant then and there knew of the hazard incident to automobiles traveling said new highway and undertaking to negotiate said curve and entering said Hawkins Avenue at said point" (R. 4).

(c) That under respondent's contract with the highway commission for construction of said highway and also under the law of Mississippi, it was respondent's

duty to construct and maintain barricades and danger and warning signals at all dangerous points along said new highway, including the said point of intersection of the new highway with Hawkins Avenue (R. 5).

(d) That respondent negligently failed to discharge its said duty in that shortly before the accident complained of the respondent removed all barricades and all danger and warning signals from said new highway and opened the entire link of said new highway to traffic and travel by the general public, and invited the public, including petitioner, to use the new highway, and negligently failed to erect any barricade or warning sign or danger signal at or near said sharp curve where the new highway abruptly ended at its intersection with Hawkins Avenue, and consequently there was great danger that persons traveling the new highway and unfamiliar therewith, particularly in the nighttime, might approach said abrupt end of the new highway at a rapid speed and be thereby entrapped at said curve and be unable to negotiate the same with reasonable safety, and that respondent knew the same or should have known thereof by the exercise of reasonable care, but negligently maintained said sharp and abrupt curve at said point without any kind of barricade or warning sign or danger signal (R. 5).

(e) That on September 10, 1939, petitioner was operating an automobile, in the nighttime, in a southerly direction en route from Prentiss, Mississippi, to Columbia, Mississippi, and he was ignorant of said dangerous and unsafe curve and could not see the same by the headlights of his automobile until he reached the intersection, when it was then too late to check his speed sufficiently to negotiate the curve with reasonable safety, and that said automobile was caused to enter said curve at a rapid rate of speed and to be thereby overturned and wrecked, as a result of which petitioner received most serious permanent injuries (R. 6).

(f) That the proximate cause thereof was respondent's negligence in failing to exercise reasonable care to provide a barricade, or warning sign, or some signal of danger at or near said point so as to warn travelers of said dangerous curve and of the abrupt ending of the highway thereat (R. 7).

2. *The Answer*: Respondent's answer admitted the general situation described in the complaint, admitted that the job had not been accepted by the highway commission at the time of the wreck, admitted that the highway was still in respondent's possession and control at the time, but, as a first defense, denied the negligence charged, and, as a second defense, averred that petitioner's own negligence brought about and contributed to his injuries in that he was driving at a reckless and unlawful rate of speed without keeping a proper lookout and without exercising due care for his own safety (R. 8-10).

Third. *Summary of the Evidence*: Respondent's contract with the Mississippi State Highway Commission was offered in evidence (R. 176-200). By agreement of counsel (R. 370-371) only certain pertinent portions are printed in the record. Under this contract barricades and signs were to be provided by respondent and the cost thereof was included in its bid (R. 178-179). Even when the road was closed to traffic the contractor was obligated for the "construction and maintenance of barricades, danger and warning signs" and the cost thereof was included in its contract price (R. 179). The contract provided, among other things, as follows:

> "The contractor shall provide, erect, and maintain all necessary barricades, sufficient red lights, approved danger signals and signs, provide a sufficient number of watchmen, and take all necessary precaution for the protection of the work and safety of the public" (R. 197-198).
>
> "Until the final acceptance of the work by the Engineer (for the Highway Commission) as evidenced in writing, the contractor shall have the charge and care thereof" (R. 198).
>
> "No highway shall be closed to public travel except upon order of the Director (of the Highway Commission). * * * The contractor will, however, in

accordance with this section, safeguard the convenience and safety of the traveling public or others, whether: the section of the highway subject to his operations has ever been open to public travel; or, is closed by order of the Director; or, open to the public for travel during his operations. Any of these premises will not relieve the contractor of this responsibility. The Director reserves the right to open or close any section of the project to public travel at any time; this shall not be construed as acceptance by the Director of such sections. The contractor shall take such steps as are necessary to safeguard his work and operations, and the public. * * * Whenever, in the opinion of the Engineer, any roadway or any portion thereof or any structure is in acceptable condition for travel, it may be opened to traffic. Upon written order of the Engineer, the contractor may cease to maintain barriers and warning lights, the roadway may be opened to travel and the contractor relieved of further responsibility for the maintenance of barriers and warning lights on that portion of the highway. The contractor will be held responsible for any damages occurring by reason of traffic or otherwise as a result of defective work or material or other non-compliance with the contract" (R. 198-199).

The wreck in question occurred on September 10, 1939 (R. 15). The respondent continued its work on the road pursuant to its contract every day thereafter to and including September 30, when the work was completed and the contract accepted by the highway commission (R. 354-366).

The south six miles of this new highway was built upon an entirely new right of way, through an unsettled and wooded country, where there was not even a house in sight for the last two miles before it reached Hawkins Avenue (R. 20, 38, 80, 98, 112, 139-140). Hawkins Avenue was just inside the city limits, the corporation line being 350 feet to the north up the new highway (R. 208). None of the city was built up north of Hawkins Avenue along the new highway and no part of the new highway went

through any built-up portion of the city (R. 18, 38, 80, 85, 98). There was no sign at the city limits and nothing to let travelers know they were getting into Columbia (R. 18, 41-42, 52, 74-76, 78, 85, 88, 98, 107, 132, 140, 312). The new highway was surfaced with gravel and entered Hawkins Avenue, which was surfaced with black-top paving, at an angle of about 110 degrees (R. 18, 38, 85). Gravel from the new highway had been dragged by the road machine or knocked by traffic across the paving of Hawkins Avenue at the intersection, so as to obscure the intersection (R. 21, 40). On beyond the intersection was an open block of weeds and grass, covered with dust, which, combined with the gravel across the paved portion of the intersection, gave the appearance that the highway continued on straight ahead (R. 21, 40, 81, 117, 138, 161).

Respondent had maintained a barricade six miles north of the Hawkins Avenue intersection, at the point where the old and new roads converged, so as to divert southbound traffic off the new highway and onto the old road, but late in the afternoon on the day before the wreck in question, respondent removed this barricade and opened the new highway to the public for the last six miles into Columbia, and for the next 26 or 28 hours, up until this wreck, the new highway was open to traffic and in constant use by the public (R. 105, 113-114, 121). Respondent's superintendent admitted that he saw that this barricade was removed and lying down by the side of the road (R. 262) and admitted that he did not order it to be put back to keep traffic off the new highway, and admitted that he purposely left the new highway open to the public, and that the traveled part was wide open and the public was welcome to use it (R. 271-272). This barricade was removed by one of the respondent's employees engaged in machining or blading the road (R. 121, 283).

On the day before the wreck, respondent had also removed all barricades and warning signs from the south

end of the highway at its intersection with Hawkins Avenue (R. 98-99, 126-127, 135, 273, 276). Fourteen witnesses for petitioner and seven for respondent testified that there was no sort of warning sign, danger signal, light, or anything else to warn travelers of the danger at the abrupt end of the highway on the occasion in question (R. 20, 37, 74-76, 83-84, 87-88, 92, 98, 127, 139, 149, 156, 160, 164, 170-171, 233, 254-255, 273, 339, 375, 405). Respondent's superintendent admitted that on this occasion the warning sign at the Hawkins Avenue intersection was down with his knowledge and the road was opened to the public without a warning of any character at or near this place (R. 276).

This link of the new highway having thus been opened to the public on September 9, 1939, with no kind of barricade to direct travelers not to use it, and with no sort of warning signal, sign or light to advise travelers of the abrupt end of the new highway at Hawkins Avenue, the petitioner with two other people, driving in an automobile, accepted respondent's invitation to use the highway and proceeded to travel it, in the nighttime on September 10, 1939. Neither petitioner nor either of his passengers had ever been on this new highway before (R. 16, 38-39). The roadway and all parts of the automobile were in good condition (R. 18, 19, 36, 37). All were on the front seat of the car and all were watching the road ahead (R. 19, 20, 37). They were traveling at a speed of 40 to 45 miles per hour (R. 20, 39). Because of the gravel being over the paved part of the intersection, and because of the open block of dead grass and weeds beyond the intersection, covered with dust, the road appeared to continue straight ahead and they could not see the intersection and could not see the sharp turn at the intersection until they were immediately upon it (R. 20, 39, 40) and about the time the car reached the intersection petitioner applied the brakes and tried to turn to the right, but was unable to make the turn and the automobile

went into and across a drainage ditch just below the intersection and turned over (R. 21).

Numerous persons testified that it was impossible to see this intersection at night until a traveler was upon or almost upon it (R. 20, 39, 78-79, 95, 107, 117, 132, 144-145, 151, 161, 171). A number of witnesses related facts showing that the turn at the end of the highway was extremely dangerous (R. 20, 21, 39, 40, 78, 81-82, 98, 107, 116-117, 132, 144-145, 151, 152, 157, 161, 175). During the brief space of 26 or 28 hours that the road was left open without any warning signal at this dangerous intersection a number of automobiles had difficulty and some almost wrecked at this intersection. On the night of the wreck G. W. Williamson approached this turn at a speed of 25 or 30 miles per hour and had to put on his brakes in order to make the turn (R. 82). Mrs. Zeno Robertson testified that "it was a bad turn for anybody that didn't know it" (R. 107). Mr. Zeno Robertson testified that a traveler approaching the intersection, in order to see it before he reached it, "would have to be watching mighty close and knowing everything" (R. 117). Just before the wreck, on the same night, Mrs. W. D. Corley testified that she traveled this new highway with her husband driving and they approached this intersection, and, although they had been over it many times before and were familiar with it, they were unable to see it and almost had a wreck in negotiating the turn at a speed of 25 miles per hour (R. 132). Mr. W. D. Corley, an employee of the State Highway Department, testified to the same effect, and said that he was unable to see the intersection until he was almost upon it, and "it slipped up on me" (R. 144-145). Mr. Sebe Dale, district attorney for the Fifteenth Judicial District of Mississippi (R. 148), traveled the new highway and reached the intersection just after the wreck; he testified, "I was on that place before I knew it. I had never traveled that road at night; I had come off Hawkins Street on to the new highway just lots of times, but I had never come in on it at night. * * * I got pretty

close to it before I discovered it. I was running pretty fast right on up to there. I knew I was getting in to town but I didn't know how sharp that curve was. I hadn't traveled that road at night. I ran up on it rather suddenly, and it somewhat scared me. * * * I had a good car with hydraulic brakes. I slowed down and made my curve" (R. 151-152). This witness also said, on cross examination, that since the wreck counsel for respondent had requested him to observe the curve and experiment to determine at what speed he could make it, and, as to this, he said, "A man could turn it at twenty-five, but if he gets up to thirty or thirty-five his wheels will slip" (R. 152). Mrs. Robert Parker testified that she came over the new highway after the wreck on the same night and "when we came to that place there was no sign or warning that it was an intersection, and we almost had an accident" (R. 157); "it was a mighty sharp turn but I don't know the angle" (R. 158). Mrs. G. H. Hayes, Sr., came over the new road in the car with Mr. G. W. Williamson on the night of the wreck and on cross examination she was asked how far she could see the intersection before reaching it, and she said, "I didn't see it until Mr. Williamson made the turn, and I didn't realize that the turn was there; it frightened me when we made the turn because I thought we were going straight ahead" (R. 175).

There is no dispute of the fact that prior to his injury petitioner had a perfect physique, participated in school athletics, played football in high school and college, was on the boxing team and track team, a fast runner, a fine athlete, a giant in strength and in absolutely perfect physical condition (R. 22, 23, 54, 55, 68, 165, 172). There is likewise no dispute of the fact that in the wreck he sustained a severe brain injury, as well as numerous other personal injuries, all of which are permanent, and that as a result thereof his bodily strength has been impaired and his mental condition seriously affected (R. 60-73, 165-166, 172-173).

Summarizing briefly, the testimony showed that all barricades and warning signs were removed from this road about 26 or 28 hours before the wreck in question, and the road was opened by respondent to unrestricted public traffic, being at the time in first-class condition and almost completed, though still under respondent's full control, possession and responsibility and not taken over by the State Highway Commission. Danger signs had been maintained at the end of the highway until that time, but these were removed a little over a full day before the accident. There was no written order from any representative of the highway department to move these signs (R. 274) and the removal was therefore in positive violation of respondent's contract with the State Highway Commission, which provides that the warnings may be removed only "upon written order of the engineer" (R. 199). On the following night there was no kind of warning at the end of the highway; in fact no witness claims that there was any warning sign or signal or light at this point, and respondent's superintendent admits that there was none (R. 273). That it was a dangerous place is evidenced by the fact that on the very night in question not only did petitioner's wreck occur, but there were several others who had difficulty at the same place (R. 132, 144-145, 151, 157, 175). Many witnesses testified to facts showing that it was a bad turn at the end of the highway and a dangerous place to approach at night because of the fact that the road machine or passing cars had dragged or knocked gravel over the paved portion of the intersection, and on straight ahead beyond the intersection there was an open space, on the same level, grown up with grass which was covered with dust and which gave the appearance of being a continuation of the main highway, when instead of a continuation, there lay immediately beyond the intersection a drainage ditch, below the level of the ground, which constituted a pitfall and caused petitioner's wreck.

Fourth. *Proceedings at the Trial*: Upon conclusion of petitioner's evidence, respondent moved for a directed verdict (R. 200), but the district judge felt that there were sufficient facts proven to make an issue for the jury on the question whether the abrupt ending of the highway was sufficiently dangerous to require respondent to have given some reasonable warning of the situation, and accordingly overruled the motion "at this time" (R. 201). At the conclusion of all the evidence respondent renewed its motion for a directed verdict and the trial judge again overruled the same (R. 412-413 and 442-444) and submitted the cause to the jury for decision under a full, fair, and complete charge, entirely in accord with the law of Mississippi, upon the issue as to whether the situation was such that in the exercise of reasonable care respondent owed the duty of giving some kind of warning to travelers and whether it was liable for a breach of that duty (R. 413-426). The jury returned a verdict in favor of petitioner upon the issues submitted, and judgment in petitioner's favor was entered accordingly (R. 444-445).

Fifth. *Proceedings in District Court After Judgment*: (1) Within ten days after the verdict, respondent filed a motion for a new trial "or corrected judgment" (R. 445-447) which was overruled (R. 447-448). It is important to note that this motion for a new trial did not renew respondent's motions for a directed verdict, made before the verdict of the jury, as contemplated and required by Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States. The motion asked for a new trial "or corrected judgment" but did not ask for a judgment notwithstanding the verdict or for a judgment to be entered in respondent's favor in accordance with its prior motions for a directed verdict (R. 445-446). Furthermore, the order overruling respondent's motion describes the motion as being "for a new trial or corrected judgment" and in the adjudicating part says "It is thereupon the judgment of the court that the *motion for a new trial* filed

by and for the defendant herein be and it is hereby overruled, and to which action of the court the defendant in open court excepted and which exception was granted" (R. 447-448). Neither the overruling order nor the respondent's exception thereto makes any reference whatsoever to any motion or request for a judgment to be entered in respondent's favor in accordance with its prior motions for a directed verdict, as required by said Rule 50 (b). Rspondent made no request for any further or additional order or ruling on its motion.

(2) Respondent subsequently gave notice of appeal to the circuit court of appeals (R. 448) complaining only therein of the trial court's action in overruling its motion for a new trial and making no claim whatever that a judgment *non obstante veredicto* should have been entered.

Sixth. *Proceedings in Circuit Court of Appeals*: The circuit court of appeals (1) held that as a matter of law the turn into Hawkins Avenue at the end of the new highway was not dangerous, that therefore respondent was under no duty to give any warning of the turn, and that consequently respondent "was in no way guilty of negligence which caused or contributed to the accident" (R. 463) and (2) held that "the defendant's motion for an instructed verdict should have been granted" (R. 463) and accordingly entered a judgment reversing the judgment of the district court and dismissing petitioner's suit (R. 463), thereby disregarding respondent's failure to comply with the requirements of Rule 50 (b) in asking for a judgment notwithstanding the verdict, and holding, in effect, that a compliance with this rule by respondent was not necessary in order to justify entry of judgment in respondent's favor in dismissing the complaint. As to these two points, petitioner shows:

(1) *As to Whether Respondent Should Have Given Warning to Travelers*: Petitioner was entitled under the law to the benefit of the most favorable inferences de-

ducible in his favor from the substantial evidence offered at the trial. There was abundant substantial evidence from which an inference might be drawn that the turn at the end of the new highway was dangerous. The drawing of such an inference is peculiarly within the province of a jury. If the jury should determine from the evidence that the situation was dangerous, then it was the duty of the jury to determine whether respondent, in the exercise of reasonable care, should have given warning to travelers of this dangerous situation when it opened the highway to traffic and invited the public to use it, and it was also the province of the jury to determine whether respondent was guilty of negligence in failing to give any warning, as it admitted it failed. The circuit court of appeals recited one version of the facts and accepted them as established and undisputed from the evidence, disregarding other evidence in the record which tended to establish directly the opposite, particularly with reference to the dangerous situation at the end of the highway. The facts which the court found could have been found by the jury, or the opposite could have been found by the jury, as was in fact done in this case. It certainly cannot be said, however, that the facts which the court found and the inferences which the court drew were those most favorable to petitioner which could be found or deduced from the evidence in this case, and it has long been the settled law that the verdict of a jury is not to be peremptorily directed or upset upon appeal unless the latter is true. Therefore the holding of the circuit court of appeals was a direct invasion of the province of the jury in that it understates and ignores some of the facts upon which petitioner relied, and as between conflicting testimony it chooses a version entirely different from that which it may be fairly assumed the jury believed as, for instance, the court said, "The curve was not in itself dangerous and could be and was safely negotiated by drivers of other automobiles traveling along the road that very night" (R. 463), ignoring entirely the fact that numerous witnesses testified to facts from which it might

be inferred that the turn was dangerous (R. 20, 21, 39, 40, 78, 81, 82, 98, 107, 116, 117, 132, 144, 145, 151, 157, 161, 175), ignoring the fact that eevry automobile at or around the time of the wreck, which was shortly after dark, had difficulty in making the turn and almost wrecked at the same spot (R. 82, 132, 144, 145, 151, 152, 157, 175), and ignoring the further fact which petitioner sought to show at the trial, and would have shown but for the objection of respondent, that shortly after the wreck respondent's witness, Robert Newsom, obtained and placed a lighted flare in the highway at the approach to its end (R. 255) and that the other automobiles which safely made the turn that night after the wreck had the benefit of this flare as a warning (R. 84, 88, 156). Again, the circuit court of appeals invaded the province of the jury in holding that respondent "was in no way guilty of negligence which caused or contributed to the accident" (R. 463), thereby depriving the jury of the right under the law to determine from the facts proven what does and does not constitute negligence and whether reasonable care has been exercised, for it has long been the settled law that questions of reasonable care and negligence are questions for determination by a jury and not by the court where there are facts in evidence from which reasonable men might infer that reasonable care has not been exercised and that negligence has been established. Furthermore, the circuit court of appeals invaded the province of the jury in holding that "the failure of the appellee (petitioner) to have his car under proper control as he approached and entered the curve was the sole proximate cause of the accident" (R. 463) for it has long been the settled law that if in an accident both parties are guilty of negligence, then the question of whose negligence was the proximate cause of the resulting injury is a question of fact for decision by a jury.

It is submitted by petitioner that these holdings of the circuit court of appeals violated the Seventh Amendment to the Federal Constitution in that they denied petitioner the right of a trial by jury.

(2) *Respondent's Failure to Comply With Requirements of Rule* 50 (b): In its motion for a new trial respondent merely moved "to set aside the verdict of the jury and the judgment entered thereon in the sum of $15,750.00 and to grant to the defendant a new trial or corrected judgment" (R. 445). In the order overruling the motion it is adjudicated merely "that the motion for a new trial filed by and for the defendant herein be and it is hereby overruled" (R. 447-448). Neither in the motion nor in the order entered thereon is there any request or reference to a request by respondent "to have the verdict and any judgment entered thereon set aside *and to have judgment entered in accordance with his motion for a directed verdict,*" as required by Rule 50 (b) of the Rules of Civil Procedure, nor is any such request or suggestion made in respondent's notice of appeal (R. 448). There is no indication in the proceedings looking to an appeal that respondent was seeking in the circuit court of appeals anything other than a conventional reversal and remand for a new trial on the merits, but notwithstanding this, and notwithstanding respondent's failure to comply with Rule 50 (b), the circuit court of appeals gave respondent the benefit of Rule 50 (b) and reversed the judgment of the district court and summarily dismissed petitioner's complaint (R. 463). The effect of this action is that petitioner has been denied his right to have respondent comply with Rule 50 (b) by requesting a judgment *non obstante veredicto* as a condition precedent to dismissal of his complaint after verdict and judgment.

B.

BASIS OF THE COURT'S JURISDICTION.

It is competent for this court to require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1925, Chapter 229, Sec-

tion 1, 43 Stat. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 United States Code Annotated, Section 347.

C.

QUESTIONS PRESENTED.

Two separate and wholly independent questions are presented:

(1) Whether the circuit court of appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment to the Federal Constitution in peremptorily determining that there was no evidence upon which the jury might find that the place where petitioner was injured at the end of the highway was dangerous, in peremptorily determining that respondent was under no duty to give warning to travelers approaching the end of the highway, in peremptorily determining the question whether respondent was guilty of negligence in failing to give warning to travelers on the highway, and in peremptorily determining that the sole proximate cause of the accident was the negligence of petitioner in not having his car under proper control as he approached the end of the highway, thus usurping the functions of the jury by invading their exclusive province with respect to determining whether the turn at the end of the highway was dangerous, whether reasonable care required warning of such danger by respondent, and whether the admitted failure to give such warning was a proximate contributing cause of petitioner's injury.

(2) Whether Rule 50 (b) of the new Rules of Civil Procedure, which expressly provides that, "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the

jury subject to a later determination of the legal questions raised by the motion", and which further provides that, "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict," is to be construed as though it provided that if the party does not within ten days or at any other time after return of the verdict move to set aside the verdict and judgment and to have contrary judgment entered in accordance with his original motion made before verdict, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party, after judgment, need not seek a judgment *non obstante veredicto* in the district court, nor the district court consider the entry of one, in order to authorize the circuit court of appeals to hold that such judgment *non obstante veredicto* should have been entered in the district court and to peremptorily enter such judgment itself, thus attributing to the district court error in failing to do that which the district court was not asked to do.

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) Because it is important, in order that the right of trial by jury may be preserved as intended by the Seventh Amendment to the Federal Constitution, that this court shall determine whether a circuit court of appeals may determine that a verdict should have been directed by finding facts less favorable to petitioner than those which might have been found by the jury on the evidence, and determining that the facts so found by the court do not constitute negligence, and further determining whose negligence was the sole proximate cause of an accident

when there was evidence that both parties may have been guilty of negligence in a jurisdiction where contributory negligence of the plaintiff does not bar a recovery but only goes to a diminution of damages.

(2) Because the decision to be reviewed determined a novel and important question arising under Rule 50 (b) of the New Rules of Civil Procedure for District Courts in a way probably in conflict with the decision of this court in *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, 394-395, 81 L. Ed. 1177, 1181, which dealt with the state practice after which this rule was modeled, and *Montgomery Ward & Co.* v. *Duncan*, No. 30, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 3, pages 132, 136, 137, 138, 311 U. S. Adv. Ops. No. 2, page 243, which dealt directly with Rule 50 (b), and *Conway* v. *O'Brien*, No. 344, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 9, pages 574 and 575, not yet officially reported, and *Berry* v. *United States*, No. 336, October, 1940, Term, 85 L. Ed., Adv. Ops. No. 9, pages 576, 577, 578, not yet officially reported in which last two cases this court granted certiorari because of failure of the circuit court of appeals to properly apply Rule 50 (b) and in which this court indicated its thought as to Rule 50 (b) but which cases were decided on other grounds after certiorari was granted for a consideration of the efefct and application of Rule 50 (b).

E.

PRAYER FOR WRIT.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered

and entitled on its docket, "No. 9833, *C. C. Moore Construction Company, Inc., Appellant*, v. *George H. Hayes, Jr., Appellee*," and that the judgment of said circuit court in said cause may be reviewed and determined by this Honorable Court.

George H. Hayes, Jr.,
Petitioner,

By Toxey Hall and
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